NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
D.P. MARSHALL JR., Judge

DIVISION I

CACR06-568

14 February 2007

AARON DOUGLAS	AN APPEAL FROM THE LONOKE COUNTY CIRCUIT
APPELLANT	COURT [CR-05-244] v.
	HONORABLE LANCE L.
STATE OF ARKANSAS	HANSHAW JR., JUDGE
APPELLEE	AFFIRMED

D.P. MARSHALL JR., Judge

Aaron J. Douglas appeals his conviction for commercial burglary of the car wash at the BP station in Lonoke. He argues the circuit court erred by not giving two jury instructions: one about the lesser-included offense of breaking or entering, and one elaborating the burglary statute's definition of a "commercial occupiable structure." Douglas also argues the circuit court erred in adjudicating him to be a habitual offender. We hold that the circuit court resolved all these issues correctly.

The premises of the BP station in Lonoke follow a familiar pattern: a

convenience store and a stand-alone car wash. The car wash includes an equipment room. At least once each day, and oftentimes more, a station employee checks and refills the chemicals and soap in that room and cleans up around the car wash. There is a change machine attached to the outside wall, and the cash box is inside the equipment room. Several times each week, an employee comes from out of town and empties the cash box. The station's part-time custodian (who was usually the person who maintained the car wash) also details vehicles there on his own time. He estimated that he spends between five hours and fifty hours each week working at the car wash—maintaining it, cleaning, and doing his detailing. He stored his equipment and supplies in the equipment room. No customer, however, enters that room.

Three men hanging around the car wash late one night prompted a BP station employee to call the police. While two of his friends kept a lookout, Douglas got inside the equipment room. The responding Lonoke police officer heard banging and found Douglas in the room. The officer advised Douglas of his rights. Douglas then admitted that he had pried open the room's locked door and, when the officer arrived, was trying to get into the cash box with a hacksaw.

First, the dispute about the jury instructions was really a dispute about whether the car wash was—in the statute's term—a commercial occupiable structure. The record leaves no doubt that it was. Our Code defines a "commercial occupiable

structure" for purposes of the burglary statute as "a vehicle, building, or other structure in which any person carries on a business or other calling[.]" Ark. Code Ann. § 5-39-101(1) (Repl. 2006). This car wash fits this definition. Customers came and went. Employees were around the car wash periodically every day, cleaning and going in and out of the equipment room as they kept the car wash in good order. The car-detailer was there each week, carrying on his own business and using the equipment room as he did so. There was no rational basis for the jury to conclude that the car wash was anything other than a structure occupied by people doing business.

Douglas argues to the contrary by focusing on the equipment room alone. Customers, it is undisputed, did not go into that room. But our precedent holds that an employees-only room attached to a business open to the public is part of that commercial structure for purposes of the burglary statute. *Winters v. State*, 41 Ark. App. 104, 110, 848 S.W.2d 441, 445 (1993). Douglas argues further that, because the car wash was not attached to the convenience store, the equipment room was not a commercial occupiable structure. This argument is wide of the mark: the car wash itself was a commercial occupiable structure, and the equipment room was an integral part of the car wash. Of course people were not at the car wash all the time. Our cases, however, establish that this circumstance does not change the commercial

nature of a structure for purposes of burglary. *Barksdale v. State*, 262 Ark. 271, 274, 555 S.W.2d 948, 950 (1977).

As Douglas points out, defendants are usually entitled to an instruction about a lesser-included offense. The circuit court nonetheless correctly rejected Douglas's request for a breaking-or-entering instruction in this case: all the material facts about the car wash and the equipment room were undisputed; and on those facts, the jury had no rational basis to acquit Douglas of commercial burglary while convicting him of breaking or entering. Ark. Code Ann. § 5-1-110 (c) (Repl. 2006). The General Assembly's sound policy distinction between those two crimes is the additional danger posed to people from theft in a commercial setting where people are likely to be present. Original Commentary to Ark. Code Ann. § 5-39-201 (Repl. 1995). That danger existed at the car wash at the BP station in Lonoke because people occupied all parts of this structure, including the equipment room, from time to time each day in the course of doing various business.

Nor did the circuit court abuse its discretion by rejecting Douglas's proposed instruction about the definition of a commercially occupiable structure. The court gave model criminal instruction 3902, which incorporated the applicable part of the statutory definition. The circuit court must use a model instruction if one accurately states the law, *Moore v. State*, 317 Ark. 630, 635, 882 S.W.2d 667, 669 (1994), and

AMCI 2d 3902 did. Douglas proposed an expanded version of the model instruction that included some language from our opinion in *Winters*. Whatever the appropriateness of that additional language may have been for this case, the circuit court was well within its discretion in using the model instruction and rejecting Douglas's expanded version. *Moore*, 317 Ark. at 635, 882 S.W.2d at 669–70.

Secondly, the circuit court did not err when it adjudicated Douglas a habitual offender. The information charged him as a habitual offender. At the start of the sentencing phase, the State approached the bench and offered certified copies of Douglas's convictions for theft by receiving, theft of property, and residential burglary. Douglas did not object. The circuit court admitted all those convictions into evidence and only then did the State publish them to the jury. At the end of the sentencing hearing, when the circuit court began to instruct the jury, then Douglas objected, pointed to the habitual-offender statute, and argued that he had not had the opportunity to challenge the prior convictions in a separate hearing between the guilt phase and the sentencing phase. Ark. Code Ann. § 5-4-501 (c)(4)(A) (Repl. 2006).

No reversible error occurred. Douglas was on notice of the State's intention to seek a longer sentence based on his prior convictions. He did not ask for a separate hearing before sentencing to challenge the State's proof of those convictions. He did not object to the admission of the certified copies of his prior convictions when the

State first offered them outside the jury's presence at the threshold of the sentencing phase. When Douglas did object later, the circuit court asked him about what evidence he had to offer to challenge the convictions. Douglas responded that his objection was based on his lack of opportunity to contest the prior convictions before the sentencing phase began. We see no prejudice to Douglas in this sequence of events, and he does not argue any. In light of all these circumstances, we hold that the circuit court's substantial compliance with the habitual-offender statute more than adequately protected Douglas. *Jones v. State*, 283 Ark. 308, 314–15, 675 S.W.2d 825, 828 (1984).

Affirmed.

HART and HEFFLEY, JJ., agree.